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IN THE

SUPREME COURT OF THE UNITED STATES

No. 84 6263 Misc., October Term, 1984

JAMES KIRKLAND BATSON,

Petitioner,

V.

COMMONWEALTH OF KENTUCKY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF KENTUCKY

FRANK W. HEFT, JR.
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CERTIFICATE

I hereby certify that a copy of the Petition was served by depositing the same in a United States mailbox, with first-class postage prepaid, to Mr. Paul Reilander, Assistant Attorney General of Kentucky, Capitol Building, Frankfort, Kentucky 40601, Counsel for Respondent, on February 15, 1985.

FRANK W. HEFT, JR.
COUNSEL FOR PETITIONER

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF KENTUCKY

The petitioner, James Kirkland Batson, prays that a Writ of Certiorari be issued to review the decision of the Supreme Court of Kentucky in his case.

QUESTION PRESENTED

IN A CRIMINAL CASE, DOES A STATE TRIAL COURT ERR WHEN, OVER THE OBJECTION OF A BLACK DEFENDANT, IT SWEARS AN ALL WHITE JURY CONSTITUTED ONLY AFTER THE PROSECUTOR HAD EXERCISED FOUR OF HIS SIX PEREMPTORY CHALLENGES TO STRIKE ALL OF THE BLACK VENIREMEN FROM THE PANEL IN VIOLATION OF CONSTITUTIONAL PROVISIONS GUARANTEEING THE DEFENDANT AN IMPARTIAL JURY AND A JURY COMPOSED OF PERSONS REPRESENTING A FAIR CROSS SECTION OF THE COMMUNITY?

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OPINIONS BELOW

No written opinion was rendered by the Jefferson County, Kentucky Circuit Court. Following a jury trial, Petitioner was convicted of Second Degree Burglary [Ky.Rev.Stat. (KRS) 511.030] and Receiving Stolen Property with a value greater than $100.00 (KRS 514.110) on February 14, 1984. (TR, 211). On March 20, 1984, the Jefferson Circuit Court entered final judgment, sentencing Petitioner to twenty (20) years imprisonment. (TR, 222; Appendix, App., p. 1).

By Opinion rendered December 20, 1984, the Supreme Court of Kentucky affirmed Petitioner's conviction. The case was styled, James Kirkland Batson v. Commonwealth of Kentucky, No. 84-SC-733-MR. The Opinion was issued as one "not be be published."

JURISDICTION

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. §1257(3). The Supreme Court of Kentucky affirmed Petitioner's conviction in an unpublished Opinion rendered December 20, 1984. This Petition is, therefore, timely filed pursuant to Sup.Ct.R. 20.1.

CONSTITUTIONAL PROVISIONS INVOLVED

SIXTH AMENDMENT

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed***

FOURTEENTH AMENDMENT, Section One

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

James Kirkland Batson was charged with Second Degree Burglary and Receipt of Stolen Property with a value greater than $100.00 as a result of an incident in which Mrs. Henrietta Spencer said that she saw him in her house stealing two purses that belonged to her. (TE, 18-20; 47-48; 157-159). The receiving stolen property charge resulted from the testimony of a pawn broker who said that Batson and another pawned to him a wristwatch and some rings taken from Mrs. Spencer. (TE, 139-140; 136-138).

On the day of trial,[1] a jury panel was presented for examination and, in accordance with Kentucky practice, each party was allowed to exercise peremptory challenges. [Kentucky Rules of Criminal Procedure (RCr) 9.36(2)(3)]. (TE, 5). Under the rules of court in Kentucky, the prosecutor was allowed five peremptory charges and one extra peremptory due to the calling of extra jurors for examination. [RCr 9.40(1)(2)]. Mr. Gutmann, the prosecutor, used his peremptory strikes in the following manner:

> Yeah, during this particular -- yeah, I struck four blacks and two whites. (TE, 7-8).

He also admitted that his peremptory strikes left an "all-white jury." (TE, 8). The significance of Gutmann's actions was that

> ...There were four black jurors on the case. (TE, 6).

The trial attorney for Petitioner, Doug Dowell, advised the trial judge that

> After I reviewed my notes, I noted that all four of them were struck by the Commonwealth's peremptories. (TE, 6).

On this basis, Dowell moved the court to discharge the panel (TE, 6), and, later, objected to the swearing of the panel as the jury in the case. (TE, 8). As grounds, Dowell argued that Petitioner would be denied an impartial trial by a cross-section of the community and would be denied equal protection of the law. The provisions of the Sixth and Fourteenth Amendments were relied on in this argument. (TE, 6; 8). Both the objection to the swearing of the panel and the motion

---

1. For the convenience of the Court, the pertinent parts of the trial record and the Petitioner's brief on appeal are set out in the Appendix.

to discharge were overruled. (TE, 8). The jury was then sworn for service on Batson's case. (TE, 9).

On the basis of the evidence referred to at the beginning of this statement of facts, the jury returned verdicts of guilt on the charges of burglary and receipt of stolen property. (TR, 222; App., 7). The punishment for these offenses was enhanced pursuant to Kentucky's Persistent Felon law to a total term of twenty (20) years imprisonment. (TR, 222; App. 7).

A timely appeal was taken as a matter of right to the Supreme Court of Kentucky. (TR, 232). [RCr 12.02]. In the briefs filed by James Batson in that court, he argued that the prosecutor's action deprived Batson of the right to trial by an impartial jury guaranteed by the Sixth Amendment of the United States Constitution and Section Eleven of the Constitution of Kentucky. (App., 10). The argument presented by the Petitioner noted a distinction between the rule introduced in Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), for equal protection analysis and the requirements of the Sixth Amendment of the United States Constitution which was made applicable to the states in Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 690 (1965). (App., 10). On the particular facts of this case, Petitioner also argued that his right to equal protection of the law and due process of law was denied. (App. 13). Petitioner asked the Supreme Court of Kentucky to vacate the judgment and to remand to the trial court for hearing on the reasons for the peremptory challenges by the prosecutor (App. 13).

In an unpublished Opinion rendered on December 20, 1984, the Supreme Court of Kentucky rejected Petitioner's argument holding that it had recently "reaffirmed our reliance upon Swain" and that because Batson had not shown "systematic exclusion from the jury drum" his claim was not cognizable under Swain, "and we decline to adopt another rule." (App., 5). The judgment of the circuit court was affirmed. (App., 6).

REASON FOR ISSUANCE OF THE WRIT

This case presents the important question of whether the Constitution allows a prosecutor to use peremptory challenges in jury selection solely on the basis of the prospective juror's race. The matter of improper use of peremptory challenges by a prosecutor is an issue that involves the Sixth Amendment of the United States Constitution because such challenges can result in a jury that does not represent the community and which may, therefore, prevent a trial before a fair and impartial jury. In Taylor v. Louisiana, 419 U.S. 522, 530, 95 S.Ct. 692, 698, 42 L.Ed.2d 690 (1975), the Court accepted as a necessary component of a fair trial a jury made up of a fair cross section of the community. Such a jury is required as a prophylaxis against arbitrary exercise of authority. [Taylor v. Louisiana, 419 U.S. at 530, 95 S.Ct. at 698]. Acknowledgment of this fundamental requirement has called into question the rule concerning peremptory challenges set out in Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965). In that case, the Court held that the equal protection clause of the Fourteenth Amendment does not afford a criminal defendant the right to question the prosecutor's use of peremptory challenges in any one case. [380 U.S. at 222, 85 S.Ct. at 837]. A presumption of rectitude was assigned to the prosecutor which could be rebutted only by a showing that the prosecutor over a period of years struck all blacks from jury panels. [380 U.S. at 223; 85 S.Ct. at 837]. In recent years, this rule has come under increasingly strident attack. The gist of these attacks has been

> There is no point in taking elaborate steps to ensure that Negroes are included on venires simply so they can be struck because of their race by a prosecutor's use of peremptory challenges. [Dissent from denial of certiorari, McCray v. New York, _____ U.S. _____, 103 S.Ct. 2438, 2442, 77 L.Ed.2d 1332 (1983)].

The history of the United States gives ample support to the conclusion that minorities, blacks in particular, are subject to treatment based on racial stereotypes rather than individual characteristics and merit. The Thirteenth, Fourteenth, and Fifteenth Amendments of the United States Constitution bear witness to the existence of racial discrimination. The recent renewal of the Voting Rights Act of 1965 is further

evidence of continued unequal treatment of blacks. [June 29, 1982, P.L. 97-205, 42 U.S.C.S. §1971 et. seq.]. It is, therefore, not surprising that the exclusion of blacks from juries by means of peremptory challenges exercised by representatives of the state creates the suspicion that racial stereotypes rather than individual unsuitability for jury service on a particular case are the motives for the challenges. It is necessary to have some reasonable means to probe the motives of the prosecutor. The means provided by Swain is not sufficient to the task. The requirement of showing a long term systematic exclusion of blacks is an insuperable obstacle to redress of constitutional rights. [McCray v. New York, dissent from denial of certiorari, 103 S.Ct. at 2440]. Without a determined effort by the defense bar, which tends to be composed of sole practitioners and small firms, the record keeping required to show the required "pattern of conduct" in any one area likely cannot be done. In any event, the requirement of Swain is an excessive burden in light of the relief that customarily will be sought in cases where the prosecutor's challenges are questioned. The common point of the recent cases that depart from the Swain rule is that the prosecutor will have to explain his actions only where he has struck all the members of a cognizable group and there is a likelihood that the members are being challenged only because they are members of the group. [People v. Wheeler, 148 Cal.Rptr. 890, 583 P.2d 748 (1978); Commonwealth v. Soares, 377 Mass. 461, 387 N.E.2d 499 (1979); McCray v. Abrams, _____F.2d_____ (2 Cir. 1984), 36 Cr L. 2197 (12-19-84)]. Even if the prosecutor is called to account, he has only to provide some non-racial motivation for his peremptory challenges to avoid discharge of the jury or the grant of a new trial. The right to an impartial jury made up of a fair cross section of the community is of sufficient importance to require adoption of a new rule to protect the right. The Court has impliedly recognized the need.

In 1983 the Court voted to deny certiorari in a group of cases collected under the name of McCray v. New York, _____U.S._____, 103 S.Ct. 2438, 77 L.Ed.2d 1322 (1983). Two justices dissented, arguing that the petition should be granted for reasons similar to those

presented in this Petition. [103 S.Ct. at 2439]. Three other justices agreed that the discriminatory use of peremptory challenges merited consideration but preferred to allow other Courts to consider the question in order to "enable us to deal with the issue more wisely at a later date." [103 S.Ct. at 2438]. The absence of conflicting decisions within the federal system was also noted. [103 S.Ct. at 2438]. This group of justices took as a hopeful sign the adoption of new principles to deal with improper peremptory challenges in People v. Wheeler and Commonwealth v. Soares (both cited above) in 1978 and 1979. However, the Court's invitation to other courts has gone largely unaccepted. A review of cases decided since 1978 when People v. Wheeler was issued, shows that twenty-five states have considered the Swain rule and its alternatives. (A table of these cases is found in the Appendix at page 19. The cases are compiled under the headings that follow).

Of the twenty-five cases decided, fourteen (14) have reaffirmed adherence to Swain either by direct citation or by requiring evidence of long standing and systematic exclusion to justify relief. Of the fourteen states that have followed Swain, seven (7) did so in opinions rendered in 1983 ane 1984. The remaining seven (7) chose the Swain rule in cases decided in 1981 and 1982. Indiana, Louisiana, and New York reiterated their already established allegiance to Swain. Four states would not or could not decide the issue in the case that was presented. Two states decided cases on the ground that a defendant has no right to a particular jury. One jurisdiction, the District of Columbia, ruled that Wheeler and Soares were decided on state constitutional grounds and that, therefore, the federal constitution was not raised by the question of improper challenges.

Since 1978-1979 when Wheeler and Soares were decided, only New Mexico and Florida have established new rules. New Mexico solved the problem by saying that its courts would consider arguments made pursuant to Swain or Wheeler-Soares. Florida adopted a new rule similar to Wheeler-Soares in 1984.

There is nothing in the review of cases above to encourage the belief that the states are willing to do their part as "laboratories

in which the issue receives further study before it is addressed by this Court." [McCray v. New York, 103 S.Ct. at 2439]. The laconic and curt opinion of the Supreme Court of Kentucky in the present case is typical of the treatment that this issue has received in the jurisdictions that continue to follow Swain. These courts show no real interest in reconsidering Swain. Therefore, this Court should now decide this question. If the Court does not decide this issue, it is quite likely that the issue will not be decided.

A second reason for review is the conflict of opinion recently created in the federal court system. On December 4, 1985, the United States Court of Appeals for the Second Circuit rendered an Opinion styled McCray v. Abrams, _____F.2d_____ (1984), 36 Cr.L. 2197-98, (December 19, 1984), which held that Swain continued to control cases presented on equal protection principles, but that another approach based on the Sixth Amendment to the United States Constitution was possible. That court held that discriminatory use of peremptory challenges by the prosecutor violated the right to trial by a jury composed of a fair cross section of the community. A two-part showing by the defendant was devised by which the defendant is required to show that the group that is challenged is "cognizable" and that there is a "substantial likelihood" that the challenge was based on group affiliation. If such a showing is made, then the prosecutor must show that his strikes were "racially neutral." Unless the prosecutor satisfies the trial court that permissible reasons motivated his peremptory challenges, the picked jury must be discharged and a new jury selected from a different panel.

It may readily be seen by referring to the recent cases of United States v. Thompson, 730 F.2d 82 (8 Cir. 1984) and United States v. Whitfield, 715 F.2d 145 (4 Cir. 1983), that McCray v. Abrams creates a conflict of authority in the federal courts. The Court should act to resolve this conflict.

Another important reason for review of this case is that state court decisions are in obvious conflict with a large number of states holding to the equal protection analysis of Swain v. Alabama, cited above, while some few states have changed to a principle of fair

representation on a jury pursuant to the Sixth Amendment of the United States Constitution. (See Appendix, p. 19). Those states retaining the Swain rule have decided the issue of discriminatory use of peremptory challenges in a way that this Court implies is not the way it will settle the question when the question is accepted for review. [McCray v. New York, _____U.S._____, 103 S.Ct. 2438-2439; 77 L.Ed.2d 1322 (1983); Thompson v. United States, _____U.S. _____, 105 S.Ct. 443 (1984)]. This matter should be settled by this Court which is the one judicial body capable of making an authoritative disposition of the issue.

This case would make an excellent vehicle by which to settle the question of improper use of peremptory challenges. All blacks were removed from the jury because of the prosecutor's peremptory challenges. A discrete group was removed from the jury which raises the suspicion that the strikes were made for reasons of group association rather than the individual's lack of fitness to serve on the jury. For the reasons shown in this Petition, the Court is urged to grant the writ prayed for.

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A.M. JAN 25 1985 P.M.

PAULIE MILLER
CIRCUIT CLERK
JEFFERSON COUNTY

Supreme Court of Kentucky

NO. 84-SC-733-MR

JAMES KIRKLAND BATSON — APPELLANT

FINAL

DATE JAN 10 1985

V.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEORGE RYAN, JUDGE
NO. 82-CR-0011

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, James Kirkland Batson, was convicted by a jury in the Jefferson Circuit Court of second-degree burglary and receiving stolen property over $100.00. Punishment was raised to 20 years for both counts after the establishment of second-degree persistent felony offender status.

Appellant was convicted of burglarizing the home of Mrs. Henrietta Spencer and her husband in September of 1981. Mrs. Spencer testified that while she was sitting in her living room with her husband, she felt a draft, heard a noise, and then saw a young black man stooping in their front doorway and taking purses which were hanging on a doorknob in the next room.

[illegible] ladies' rings. Mrs. Spencer later identified the appellant as the man she saw by the[illegible] neighbor, Regina Cornellius, stated to police that on the day of the burglary she saw appellant Batson standing between her house and the Spencers', and later saw him running away from the back of the Spencers' house. Appellant produced a witness at trial, Lee Weese, an investigator for the public defender, who testified that Mrs. Cornellius gave him a statement some six months later that appellant Batson appeared to be standing guard and that there was another person whom she did not know standing at the front of the Spencers' house with a chair.

Appellant's conviction for receipt of stolen property arose from an incident where appellant Batson and co-indictee Larry Macklin appeared together at a pawn shop where Batson pawned a Caravelle watch and Macklin pawned two ladies' rings. The two rings were later identified by Mrs. Spencer as belonging to her. Batson was charged with having acted alone or in complicity with Macklin on this charge, but Macklin is not a party to this appeal.

Appellant charges the trial court with four errors in his appeal. First of all, appellant argues that the evidence at trial did not exclusively support the felony charge of receiving stolen property in an amount over $100, and therefore the trial judge erred in refusing appellant's tendered instructions on the misdemeanor charge of receipt of stolen property under $100.00.

a trial court is duty bound to give instructions applicable to every state of the case deducible or supported by the testimony, including instructions on lesser-included offenses where there could be reasonable doubt as to the greater offense. Kelly v. Commonwealth, Ky., 267 S.W.2d 536 (1954), and Luttrell v. Commonwealth, Ky., 554 S.W.2d 78 (1977). The evidence at trial concerning value consisted of testimony by Mrs. Spencer that one of the rings had a fair-market value of $110.00, and the testimony of the pawnbroker that the replacement value of the two rings was in excess of $100.00 although he allowed only $15.00 for each ring. The record shows that it was his practice to give only a small percentage of an item's full value in pawn. Thus, the evidence of the pawn value of the rings is irrelevant to an accurate determination of their fair-market value. There was no evidence from which it could reasonably be inferred that the fair-market value of the rings was less than $100.00.

Appellant's second assertion of error is that he was denied a fair trial due to the trial court's refusal to provide his counsel with a transcript of a previous trial on the same charge which ended in a mistrial. Appellant relies on Britt v. North Carolina, 404 U.S. 226, 92 S. Ct. 431, 30 L. Ed.2d 400 (1971), which stands for the proposition that a state must provide an indigent defendant with the transcript of a prior trial if needed for an effective defense. Appellant asserts that his need for a transcript can be seen by the inherent value of a transcript of prior proceedings as a discovery device or impeachment tool, and by a situation which occurred at trial

wherein a transcript was actually issued. Appellant points to a situation where a Commonwealth's witness testified inconsistently with his testimony at the previous trial. Later, during the appellant's case-in-chief, appellant's counsel sought to have the court reporter read notes of the prior testimony, but was refused by the trial court. A later avowal of the testimony clearly showed the inconsistency. However, the record shows the trial court's refusal to allow the court reporter's notes to be read was simply that any impeachment of the witness should have occurred while he was on the stand during cross-examination, and not by the introduction of evidence during the defense's case-in-chief. The trial court showed no disposition to restrict appellant's access to the court reporter's notes.

Britt specifically holds that where adequate alternatives exist, a trial court need not provide an indigent defendant with a transcript of prior proceedings. Since the same counsel represented the appellant during both trials, and the trial court showed no inclination to restrict appellant's use of the court reporter's notes, we hold the appellant was not denied a fair trial due to the refusal to supply him with a free transcript.

Appellant next contends that it was error to permit the prosecuting attorney to exercise preemptory challenges to all of the blacks who were called as jurors in this case. Appellant acknowledged that the United States Supreme Court in Swain v. Alabama, 380 U.S. 202, 85 S. Ct. 824, 13 L. Ed. 2d 759 (1965),

rule that preempt[illegible] challenges against [illegible] themselves, do not violate the Fourteenth Amendment equal-protection clause. However, appellant urges this court to adopt the position of other states based upon the Sixth Amendment and their own state constitutions, that preemptory challenges against minority groups can be unconstitutional if they were shown to be a pattern of challenges against jurors from a discrete group and a likelihood that the challenges were based solely on group membership. People v. Wheeler, 583 P.2d 748 (Cal. 1978), and Commonwealth v. Soares, 387 N.E.2d 499 (Mass. 1979). We have recently reaffirmed our reliance upon Swain in Commonwealth v. McFerron, Ky., ____ S.W.2d ____ (1984), holding that an allegation of the lack of a fair cross-section jury which does not concern a systematic exclusion from the jury drum does not rise to constitutional proportions, and we decline to adopt another rule.

Appellant finally contends the trial court erred in refusing to admit testimony of a witness concerning the physical description of Larry Macklin. He sought to offer this testimony to show that Larry Macklin fitted the description of the perpetrator of the crime and that the identification of appellant by Mrs. Spencer may have been mistaken. By avowal the witness, Detective Robert Rutledge, stated that the arrest sheet showed that Larry Macklin was a black male weighing 170 pounds and was twenty-nine years old.

Larry Macklin was a codefendant with appellant but was tried separately. One witness testified that an unidentified person was seen fleeing the Spencer premises. Mrs. Spencer

as the only one before trial [illegible] identified appellant as that person. Evidence of any striking similarity between Macklin and appellant would be admissible as to the credibility of the identification by Mrs. Spencer, but the testimony offered was of such a general nature that it could have little, if any, effect upon the credibility of Mrs. Spencer. Further, the proffered testimony was properly excluded as hearsay. We conclude the exclusion of the testimony was not error.

The Judgment is affirmed.

All concur.

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AOC-79-450

Commonwealth of Kentucky
Court of Justice

KRS Cr. 532; RCr 11.02, 11.04

JUDGMENT AND SENTENCE ON PLEA OF NOT GUILTY (Jury Trial)

Case No. 82CF-0010

County JEFFERSON

Court DIV. 10 - CIRCUIT

COMMONWEALTH OF KENTUCKY

v.

JAMES KIRKLAND BATSON

The defendant at arraignment having entered a plea of not guilty to the following charges included within the i
dictment(s): (1) BURGLARY II (2) R.S.P. O/$100 (3) P.F.O. II
and having on the 14th day of February 19 84 appeared in open court with his attorne
Honorable Douglas Dowell
the case was tried before a jury which returned the following verdict: (BURG. II) 5 YEARS
(R.S.P. O/$100) 1 Year - (P.F.O. II) ENHANCES BURG. II TO 15 YEARS AND R.S.P. O/$100
TO 5 YEARS.

On the 20th d f March 19 84 the defendant appeared in open cou
☐ without counsel ☒ with his attorney Doug Dowell and the court inquired of the defendant an
his counsel whether they had a legal cause to show why judgment should not be pronounced, and afforded the defe
dant and his counsel the opportunity to make statements in the defendant's behalf and to present any information i
mitigation of punishment, and the court having informed the defendant and his counsel of the factual contents an
conclusions contained in the written report of the presentence investigation prepared by the Division of Probation an
Parole, the Defendant ☒ agreed with the factual contents of said report ☐ was granted a hearing to controvert th
factual contents of the report. Having given due consideration to the written report of the Division of Probation an
Parole, and to the nature and circumstances of the crime, and to the history, character and condition of the defendan
the court is of the opinion:

with a few changes.

☒ That imprisonment is necessary for the protection of the public because

_____ A. there is a substantial risk that defendant will commit another crime during any period of pr
bation or conditional discharge.

_____ B. the defendant is in the need of correctional treatment that can be provided most effectively b
the defendant's commitment to a correctional institution.

_____ C. probation or conditional discharge would unduly depreciate the seriousness of th
defendant's crime due to:

(Continued on back)

123

(4)

☐ That the defendant is not eligible for probation or conditional discharge because of the applicability of KRS 532.080 or KRS 533.060.

☐ That the defendant is eligible for probation or conditional discharge as hereinafter ordered.

No sufficient cause having been shown why judgment should not be pronounced, it is ADJUDGED BY THE COURT that the defendant is GUILTY of the following charge(s):

(1) BURGLARY II (2) RECEIVING STOLEN PROPERTY OVER $100.00 (3) PERSISTENT FELONY OFFENDER

and is sentenced to: (BURG. II) P.F.O. II ENHANCES TO 15 YEARS. (R.S.P. O/$100) P.F.O. II ENHANCES TO 5 YEARS. TO RUN CONSEC. WITH EACH OTHER & CONSEC. WITH INDICT. #82CR130

☐ fine of $ _____ to be paid _____

☐ probation as stated in the attached Order of Probation.

☐ conditional discharge as stated in the attached Order of Conditional Discharge.

☒ imprisonment for a maximum term of 20 YEARS in PENITENTIARY (institution) to run ☐ concurrently ☒ consecutively with a previous sentence imposed in #82CR1305.

It is further ORDERED that the sheriff of JEFFERSON County deliver the defendant to the custody of the Department of Corrections at such location within this Commonwealth as the Department shall designate.

It is further ORDERED that the defendant is hereby credited with time spent in custody prior to sentence, namely 19 days as certified by the jailer of Jefferson County towards service of the maximum term of imprisonment (or toward payment of a fine at the rate of $5 per day).

After imposing sentence, the court informed the defendant that he has a right to appeal with the assistance of counsel; that if he is financially unable to afford an appeal, a record will be prepared for him at public expense and counsel will be appointed to represent him; that an appeal must be taken within 10 days of the date of this judgment, and that the clerk of the court will prepare and file a notice of appeal for him within that time if he so requests. Pending appeal, the defendant is ☒ remanded to custody ☐ released on bail in the amount of $ None

It is further ORDERED that the Court Costs of this action be and hereby are waived.

(Continued on page 3)

...ment of the above charge...

☐ If there are no findings of guilt shown above, the charges are ...ssed, dismissed and the defendant is discharg...

March 20, 1984 — Judge

Judgement entered and notice of entry served on the defendant by mailing a true copy to defendant's counse... record. Doug Dowell

postage prepaid, on March 21, 19 84

PAULIE MILLER, Cl...

by DORIS FOSBERG, D...

NOTE TO CLERK: If defendant is sentenced to death or confinement, give two certified copies of this judgme... to the sheriff who delivers him to the institution. RCr 11.22.

ENTERED IN COURT

MAR 20 1984

PAULIE MILLER, Clerk

By ... Dep.

SHERIFF'S RETURN

COPIES TO:
DEPT. ATTY. - DOUG DOWELL
2 COPIES TO CRIMINAL CLERK'S OFFICE
1 COPY TO PROBATION & PAROLE

III. THE COMMONWEALTH'S ATTORNEY'S ACTION BY PEREMPTORILY CHALLENGING ALL THE BLACK JURORS IN THE PRESENT CASE DEPRIVED THE APPELLANT OF HIS RIGHT TO AN IMPARTIAL JURY BY DUE PROCESS OF LAW.

In the case at bar, the prosecutor used his peremptory challenges to strike off of the jury all four (4) black jurors. The appellant, who is black, was tried by an all white jury. These facts were stipulated by the prosecutor before the swearing of the jury panel (TE, 6-8). The appellant moved that the jury panel not be sworn for this reason (TE, 6). The court overruled the motion (TE, 8

The Sixth Amendment to the United States Constitution, as well as Section 11 of the Kentucky Constitution, guarantees to each criminal defendant the right to a jury drawn from a fair cross section of the community. [Taylor v. Louisiana, 412 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975)]. The deliberate exclusion of blacks from the jury deprives a defendant of a fair cross section of the community [Id. 479 U.S. at 528, 95 S.Ct. at 696].

Appellant concedes that Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), rejects the notion that the use of peremptory challenges against blacks, by itself, necessarily violates equal protection. However, the decision in Swain was based entirely upon the ground of equal protection of the laws, and not, as here, the Sixth Amendment. The Sixth Amendment, in this context, was made applicable to the states after the decision in Swain [Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 690 (1975)].

Since the decision in Swain, the United States Supreme Court has not examined this issue in light of the Sixth Amendment. However, the denial of certiorari in McCray v. New York, _____ U.S. _____,

103 S.Ct. 2438 (1983), indicates a probability that five (5) members of the court would prefer a differing rule under the Sixth Amendment. Justices Marshall and Brennan directly called for a new rule [103 S.Ct. at 2439-2443]. Justices Stevens, Blackmun and Powell did not disagree with the assessment made by Justice Marshall (103 S.Ct. at 2438), but preferred that "the various states...serve as laboratories in which the issue receives further study before it is addressed by this Court." [103 S.Ct. at 2439].

Two state Supreme Courts have done so. In People v. Wheeler, 148 Cal.Rptr. 890, 583 P.2d 748 (1978), the California Supreme Court held that when a prosecutor peremptorily challenges all black jurors because of a "group bias", the right to a jury drawn from a fair cross section of the community is severely compromised. The Court in Wheeler recognized that while a litigant is not actually entitled to a jury that proportionately represents the community, the litigant is still "entitled to a petit jury that is as near an approximation of the ideal cross section of the community as the practice of random draw permits." [Id. 583 P.2d at 762]. It is when the deliberate actions of the state, through its agent, seek to artifically remove elements necessary to the cross section of the community that the Sixth Amendment is invoked.

In Commonwealth v. Soares, Mass., 387 N.E.2d 499 (1979), the Supreme Judicial Court of Massachusetts followed the case of People v. Wheeler, above [Soares, 387 N.E.2d at 516]. The Court acknowledged that there is a rebuttable presumption of the proper use of peremptory challenges, but added:

> that presumption is rebuttable, however, by either party on a showing that (1) a pattern of conduct has developed whereby several prospective jurors who have been challenged peremptorily are members of a discrete group, and (2) there is a likelihood they are being excluded from the jury solely by reason of their group membership.
> [Id. 387 N.E.2d at 517].

The Court will note that the rule is similar to the rule under equal protection in Swain. However, the rule under the Sixth Amendment does not require a showing of 'systematic exclusion' over the course of several trials. It was this feature of the Swain - Equal Protection test which has made Swain the "subject of almost universal and often scathing criticism."[1] [McCray, supra, 103 S.Ct. at 2440 (Marshall, J., dissenting)].

The evidence presented by stipulation in the present case obviously meets the above test. The prosecutor had used his peremptory challenges to remove one hundred (100) percent of the black jurors. In Soares the Court found that the exercise of the challenge against twelve (12) of thirteen (13) blacks clearly demonstrated a "pattern of conduct." As to the second ground, the court found that since ninety-two (92) percent of the blacks had been struck, it indicated a "likelihood that blacks were being challenged because they were black." [Id. 387 N.E.2d at 517]. The percentage of blacks struck in the case at bar was one hundred (100) percent. Obviously, this gives rise to at least a "likelihood" of improper purpose. Soares also holds that the race of the defendant can be taken into consideratio In Soares, as in the present case, the defendant is a member of the "discrete group" being struck.

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1. The Swain test would have the perverse result of reversing the conviction of the tenth defendant because he could establish "systematic exclusion" in the nine previous cases, yet afford no relief to the previous nine defendants.

The test having been met, the prosecutor must assume a burden to explain away the use of the peremptory challenges. "[T]he burden shifts to the allegedly offending party to demonstrate, if possible, that the group members of disproportionately excluded were not struck on account of their group affiliation." [Id. 387 N.E.2d at 517].

In the case at bar, the prosecutor made no attempt to justify his use of the peremptory challenges even after being presented with the accusation that he was using the challenges for an invalid purpose and having stipulated that he had struck one hundred (100) percent of the prospective black jurors (TE, 6-8). As is demonstrated above, the prosecutor had the burden to show, if he could, that the peremptories were not done for an invalid purpose. When a litigant has a burden to show a fact, or to reasonably deny an accusation, and does not do so, it can be presumed that he is unable to do so. [Cessna v. Commonwealth, Ky., 465 S.W.2d 283, 285 (1971)]. Thus, a clear inference arises that the use of the peremptories in the case at bar were intended to accomplish an invalid purpose. Even under the discredited Swain test, this would establish a violation of the equal protection of the laws and due process of law [Swain, 380 U.S. at 223, 85 S.Ct. at 837].

Therefore, the Court is urged to vacate the judgment and remand to the trial court for hearing on the reasons of the prosecutor for the use of his peremptory strikes.

(At this point, the jury panel was seated in the courtroom in alphabetical order, voir dire examination was conducted but was specifically excluded from request for transcript per the Designation of Proceedings; strikes made by respective counsel, extra jurors excused and exited the courtroom, and the jury was seated in the jury box as follows:)

THE CLERK: As I call your name, the sheriff will conduct you to your seat in the jury box.

Juror Number One, Ruth Ran; Juror Number Two, Elsie Dupin; Juror Number Three, Richard Carroll; Juror Number Four, Dena Meece; Juror Number Five, Samuel Dabney; Juror Number Six, Lucia Vibert; Juror Number Seven, Carolyn Bunger; Juror Number Eight, Joseph Gaines; Juror Number Nine, Patrick Yarber; Juror Number Ten, Dona Estes; Juror Number Eleven, Joyce Smith; Juror Number Twelve, Arthur Dickerson; Juror Number Thirteen, Anthony Ferg.

THE CLERK: All right. Would you please stand and raise --

MR. DOWELL: Your Honor, may we approach the bench for a minute, please?

(WHEREUPON, counsel for the Commonwealth and the Defendant approached the bench where a conference was held in whispered tones, out of the hearing of the jury, as follows:)

MR. DOWELL: Your Honor, prior to the swearing of the jury, I would like to make a motion to discharge the panel on the following grounds.

There were four -- I would like the Record to reflect -- and, also, I would like it if we could have a hearing on this outside the hearing of the jury; I would like to request that -- but there were four black jurors on the case. After I reviewed my notes, I noted that all four of them were struck by the Commonwealth's pre-emptories. The jury now, as empanelled, I want the Record to reflect, is an all-white panel.

I submit that under these circumstances, the defendant is being denied his right to an impartial trial, a cross-section of the community, under the Sixth and Fourteenth Amendment. He's also being denied equal protection of the law under the U.S. Constitution. And he's also being denied a fair, impartial trial.

THE COURT: You want to have a hearing on this, don't you?

MR. DOWELL: Yes, Your Honor.

THE COURT: All right. I will pick up in just a minute.

MR. DOWELL: I would object to the swearing of the jury at this time.

THE COURT: I'm going to overrule because it has to be a cross-section of the whole, entire panel and that selection process.

Anybody can strike anybody they want to.

MR. DOWELL: Does the Court agree -- essentially, the facts I'd want to establish at a hearing are, number one, that there were four black jurors in the panel and that the Commonwealth exercised its pre-emptories as to those, all four black jurors.

THE COURT: Well, they can do it if they want to.

MR. DOWELL: Do you accept that as true? Is that accurate, Mr. Gutmann?

MR. GUTMANN: Yeah, during this particular -- yeah, I struck four blacks and

two whites.

MR. DOWELL: Okay. And that this left an all-white jury. Is that right?

MR. GUTMANN: In looking at them, yes; it's an all-white jury.

MR. DOWELL: Okay. I would assert that that violates the constitutional provisions, so I just asserted in absence of any, you know, compelling justification that that denies the defendant of equal protection of law, denies him his right to a fair cross-section and a fair and impartial jury.

THE COURT: You're talking about the cross-section selection process of the panel itself, if that happened. Out of Frankfort where they draw them by computer, you might have a point, but this is different.

MR. DOWELL: Okay. So my motion, my objection to the swearing of this jury is overruled?

THE COURT: Yes.

MR. DOWELL: And also my motion to set aside is overruled?

THE COURT: That's right.

MR. DOWELL: Okay. Thank you, Your Honor.

MR. GUTMANN: Thank you.

(End of conference at bench.)

* * *

THE COURT: All right. Swear the jury.

THE CLERK: Will you stand and raise your right hand, please.

(WHEREUPON, the jury having been duly sworn by the Clerk of the court, proceedings continued as follows:)

THE COURT: Now, all the jurors that have not been selected for one reason or another, I appreciate your being over here. We always have to have a panel large enough to select the twelve or thirteen that try the case.

Thank you very much. You can go back to the Jury Pool and maybe you can pick up another case in there.

(At this point, the "extra" jurors were excused and exited the courtroom.)

THE COURT: I'm going to call for a fifteen-minute break here now. You all have been sitting

CASES CITED SINCE 1978

A. FOLLOWING SWAIN V. ALABAMA

1. Mitchell v. State, Ala.Cr.App., 450 So.2d 181 (1984)
2. Blackwell v. State, Ga., 281 S.E.2d 684 (1981)
3. People v. Payne, 75 Ill. Dec. 643, 457 N.E.2d 1202 (1983)
4. Swope v. State, 263 Ind. 476, 325 N.E.2d 193 (1975)

   Hoskins v. State, Ind., 441 N.Ed.2d 419 (1982)
5. Commonwealth v. McFerron, Ky., _____S.W.2d_____ (1984), (Mandate Issued 32 Kentucky Law Summary 1, p. 20, January 18, 1985)
6. State v. James, La.Cr.App., 459 So.2d 1299 (1984)

   State v. Brown, La., 371 So.2d 751 (1979)
7. Lawrence v. State, Md.App., 444 A.2d 478 (1982)
8. State v. Hurley, Mo.App., 680 S.W.2d 209 (1984)
9. People v. McCray, 457 N.Y.S.2d 441, 443 N.E.2d 915 (1982)

   People v. Charles, 61 N.Y.2d 321, 473 N.Y.S.2d 941 (1984)
10. State v. Shelton, N.C.App., 281 S.E.2d 684 (1981)
11. Lee v. State, Okl.Cr., 637 P.2d 879 (1981)
12. State v. Raymond, R.I., 446 A.2d 743 (1982)
13. State v. Thompson, S.C., 281 S.E.2d 216 (1981)
14. State v. Wooden, Tenn.Cr.App., 658 S.W.2d 553 (1983)

B. NO DETERMINATION MADE

15. Mallott v. State, Alas., 608 P.2d 737 (1980)
16. People v. Smith, Colo.App., 622 P.2d 90 (1980)

   People v. Siemien, Colo.App., 671 P.2d 1021 (1983)
17. Saunders v. State, Del.Supr., 401 A.2d 629 (1979)
18. Commonwealth v. Futch, Pa., 424 A.2d 1231 (1981)

C. NO RIGHT TO PARTICULAR JURY

19. Walton v. State, 279 Ark. 193, 650 S.W.2d 231 (1983)
20. Booker v. State, Miss., 449 So.2d 209 (1984)

D. FEDERAL CONSTITUTION NOT INVOLVED

21. Doepel v. United States, D.C. App., 434 A.2d 449 (1981)

E. NEW RULES

22. People v. Wheeler, 148 Cal.Rptr. 890, 583 P.2d 748 (1978)

23. Commonwealth v. Soares, 377 Mass. 461, 387 N.Ed.2d 499 (1979)

24. State v. Crespin, 94 N.M. 486, 612 P.2d 716 (1980)

25. State v. Neil, Fla., 457 So.2d 481 (1984)